SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-979

JOHN J. TWOMEY, et al.,

Petitioners,

vs.

DONALD P. WRIGHT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

PAGE

ORDER BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED FOR REVIEW 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION:

I. TEMPORARY DISCOMFORT EXPERIENCED BY A PRISONER DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION. .....

II. ABSENT A SHOWING OF SHOCKING CIRCUMSTANCES THIS COURT SHOULD NOT PERMIT EXTENSION OF THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT TO EMBRACE PRISONER GRIEVANCES SIMILAR TO THE INSTANT COMPLAINT, PARTICULARLY IN LIGHT OF NEW, HIGHLY RESPONSIVE GRIEVANCE MACHINERY ESTABLISHED IN THE SEVERAL STATES TO REVIEW PRISONER COMPLAINTS .....

CONCLUSION 18

TABLE OF AUTHORITIES CITED

CASES:

Church v. *Hegstrom*, 416 F. 2d 449 (2d Cir. 1969) ... 12
In re Kemmeler, 136 U.S. 436 (1890) 12
Martinez v. *Mancusi*, 443 F. 2d 921 (2d Cir. 1970) ... 14
McCray v. *Bunell*, 367 F. Supp. 1191 (D. Md. 1973) .. 16
Moralez v. *Schmidt*, 494 F. 2d 85 (7th Cir. 1974) 16
Robinson v. *California*, 370 U.S. 660 (1962) 13
Snow v. *Gladden*, 338 F. 2d 999 (9th Cir. 1964) 14
Starz v. *Cullen*, 468 F. 2d 560 (1972) 13
United States ex rel. Hyde v. *McGinnis*, 429 F. 2d 864 (2d Cir. 1970) 14
Weems v. *U.S.*, 217 U.S. 349 (1910) 13

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The order of the United States Court of Appeals for The Seventh Circuit affirming the findings of fact and conclusions of law of the United States District Court, Northern District of Illinois, Eastern Division, is set forth in Appendix A. The findings of the United States District Court, Northern District of Illinois, Eastern Division, is set forth in Appendix B.

JURISDICTION

The instant Petition for Writ of Certiorari is filed pursuant to Title 28 U.S.C. § 1254(1) and seeks review of the judgment of the United States Court of Appeals for the Seventh Circuit entered on November 19, 1974. No petition for rehearing was filed with the Court of Appeals.

QUESTION PRESENTED FOR REVIEW

1. Whether the unintentional failure of prison officials to provide the prescribed diet to an inmate, resulting in less than ten days of "discomfiture" constitutes cruel and unusual punishment within the meaning of the Eighth Amendment to the United States Constitution?

2. Whether absent a showing of shocking circumstances this Court should permit extension of the prohibition against cruel and unusual punishment to embrace prisoner grievances similar to the instant complaint, particularly in light of new, highly responsive grievance machinery established in the several states to review prisoner complaints?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VIII:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Title 42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity or other proper proceeding for redress.

STATEMENT OF THE CASE

On September 28, 1972, plaintiff filed a complaint in the United States District Court for the Northern District of Illinois, No. 72 C 2281, under 42 U.S.C. § 1983. He named the Department of Corrections Hospital, Doctors, Pharmacists and the Warden of Stateville Penitentiary as defendants. He alleged that he suffered from a permanent physical condition which had resulted from a shotgun blast in the lower abdomen. It was necessary for doctors, prior to his incarceration, to resect approximately 65% of his small intestines resulting in a condition known as malabsorption syndome—an inability to retain foods long enough for absorption into the system to take place. Plaintiff alleged that he required special medication, frequent feedings and dietary supplements to maintain his health and that he was not getting them.

An expedited hearing was held on the complaint on November 3, 1972, and extensive testimony was heard. The Court found that: (1) defendants have not intentionally, wilfully or knowingly denied medical treatment to the plaintiff; (2) in the absence of any showing of complete denial of medical treatment or other exceptional circumstances, the District Court will not grant relief to prisoners seeking remedies against prison officers and physicians; and (3) the defendants had accorded medical treatment to the plaintiff and, in light of the absence of physical deterioration of plaintiff, the Court ordered the complaint for injunction denied.

On January 16, 1973, plaintiff filed another complaint before the same court. It was alleged that plaintiff had

been disciplined on December 1, 1972, through December 11, 1972, without having been accorded procedural due process and under conditions which constituted cruel and unusual punishment. Warden John Twomey, Dr. Julius Venckus, Lt. Stan Sharp, Officer Long, Counselor Stuart Trapp, Sgt. Simpson, Capt. Shifflet and Captain Pullman were named as defendants.

On October 16, 1973, an evidentiary hearing began. Testimony established that, at the time of the incident, plaintiff was permanently assigned to the officer's mess hall at the institution. In order to obtain the required frequent high protein meals, plaintiff was allowed to spend all of his time in the officer's kitchen and to prepare and eat whatever he wanted to eat at any time. Quantities of Portegen, a prescribed high protein dietary supplement, were kept available, and plaintiff was receiving various medications to combat his chronic diarrhea. Dr. Venckus testified that he frequently prescribed Lomotil, a low-grade narcotic, but attempted to cut the dosage prior to the incident at issue. On one occasion plaintiff threatened to commit suicide if he didn't get Lomotil, and other doctors treating him usually prescribed less potent drugs such as Kaopectate for the condition.

On December 1, 1972, plaintff became involved in a fight with another inmate at the officer's kitchen. Both were immediately separated and walked to disciplinary holding cells. Several hours later, plaintiff was brought before the disciplinary committee. Defendants Trapp and Sharp were serving on that committee. A hearing on the charge took place, and the District Court held that there had been good faith compliance with the requirements of procedural due process as interpreted by the courts at that time.

The committee found that plaintiff had engaged in the altercation and initially imposed a punishment of 10 days in an isolation cell. That decision was recorded on the disciplinary ticket.

As was customary, however, the committee consulted a special file to determine whether Wright had any medical problems which would prevent him from doing isolation time. They found that he had special dietary and medicinal requirements. Accordingly, the committee changed their disposition from:

> "Placed in isolation 10 days and recommended for transfer,"

to read as follows:

> "Placed in Detention Hospital on isolation rations 10 days and recommended for transfer."

Both Trapp and Sharp testified that they had changed the disposition from "isolation" to "Detention Hospital" so that Wright's special requirements could be met. The words "isolation rations" were included because it was customary to do so and to indicate to the hospital staff that the inmate was doing isolation time while there. Neither witness could testify what isolation rations included and neither intended that Wright be deprived of his special requirements. Following the hearing, Lt. Sharp wrote a note to Sgt. Simpson at the Detention Hospital with a copy to Dr. Venckus, notifying him of the disposition (Defendant's Exhibit No. 10).

On Friday afternoon, December 1, 1972, Wright was taken to the Detention Hospital to begin serving his time. Defendant Simpson was in charge of the unit at the time and he recognized Wright as he arrived. He testified that he had had Wright in the Detention Hospital on about six prior occasions and that:

> "I knew he had stomach trouble, that he was on a special diet and that he was working down in the officer's kitchen."

Simpson testified that, after Wright's arrival, he notified the hospital desk and the cell house that he was there, and made out a medical chart for him. He then sent an inmate nurse to the drug room with the chart to have his current prescriptions entered and to arrange for the medications to be sent there instead of the cellhouse. Simpson then called the food service supervisor at the officer's kitchen and arranged for the special diet and dietary supplements to be sent up. Simpson then left the institution for the weekend.

Simpson testified that during the following week the supplement Portegen was kept constantly available for Wright and that inmate nurses were instructed to give it to him any time he wanted it. He personally observed the first two of the three meals brought up each day, and they were "about twice what an ordinary man would eat." A doctor visited every cell in the facility at about 8:00 A.M. each day and Simpson did not hear of any complaints from Wright to anyone during the ten day period.

Simpson testified that he had received the note from Lt. Sharp indicating that plaintiff had been sent there "on isolation rations" (Defendant's Exhibit No. 10). He stated, however, that it only meant the inmate was doing isolation time for a certain period of days. The phrase "isolation rations" meant nothing to him in terms of food or medication because "the majority of the people that are placed up there is all Class C health, or they have a health hazard, and they have special diets for them."

Dr. Julius Venckus, the prison physician, testified that he received notice that Wright had been placed in the hospital but that he took no action because Sgt. Simpson and the pharmacy had all the information to provide Wright with the correct diet and medication. Actual delivery of these items were beyond his responsibility. He did see Wright at sick calls on December 10th and 20th but could recall no complaints about food or medicine.

Plaintiff testified that he was placed in the Hospital on Friday but received only one meal a day until Monday and then three less than adequate meals a day for the rest of the period. He stated that he seldom received his medicine and he vacillated as to when he had first seen the doctor walking sick call rounds. He could not remember the names of any person other than Sgt. Simpson who worked in the hospital at the time, and he could not remember the names of the two inmates who shared his cell during the ten days.

Wright testified that as a result of his lack of food during the 10 day period, he suffered nausea, dizziness, weakness and loss of weight. Dr. Venckus' medical records indicated that plaintiff weighed 148 lbs. on March 24, 1972 (the date of admission to the institution), 147 lbs. on August 21, 1972, 140 lbs. on March 6, 1973, and 153 lbs. on June 6, 1973 (the date of his release). Dr. Venckus stated that the records show no medically significant weight loss during his incarceration, and that he was in satisfactory physical shape.

Three reports of an examining psychiatrist were introduced. (Defendant's Exhibits 6, 7 & 8). In part those reports state:

October 13, 1972 report (Defendant's Exhibits 6).

This inmate was placed in Detention Hospital by the prison physician because the inmate requested "nerve medicine or a tranquilizer on a permanent basis."

When the inmate is asked why he is in Detention Hospital he aggrievedly replies, "Dr. Venckus sent me up here. I went to see him to receive medical treatment. I have a physical condition which the doctor for some reason don't believe is bad. I get the feeling he thinks I'm a kid."

In a long discussion following this we learn that the inmate is overfocused on his old (1968) bowel injury and surgery and has practically committed his life to thinking, talking, and centering his existence around it. This gains him more "legitimate" attention than his previous antisocial behavior. I tell him about my impression and am surprised to have the inmate respond politely that perhaps there is something to what I say.

However, he later continues to express his feeling that the prison physician dislikes him and that he therefore will not obtain what he, the inmate, considers to be proper treatment. . . .

• • •

As I review his entire history, I am led to the conclusion that the inmate is basically an antisocial personality who has now found a somatic focus for his entrenched conflicts. Tranquilizers "on a permanent basis" are not indicated.

December 21, 1972 Report (Defendant's Exhibit 7).

This inmate is summoned for interview in response to a referral from the Warden who indicates that there has been a request from the Director's Office suggesting the possibility that there may be substantial deterioration in this man since I saw him last on 13 October 1972.

I spoke to the inmate at length and can report that I find no indication of mental deterioration; as a matter of fact, I feel that his current mental state seems to be improved over that noted in the previous psychiatric examination of October.

• • •

March 2, 1973 Report (Defendant's Exhibit 8).

This inmate was placed in Detention Hospital with a notation that he complained to one of the captains that he was a very sick man, began crying, and appeared emotionally upset. The inmate relates "I went to the doctor today about my repeated stools. He gave me some medicine and I asked him politely what it was and what the purpose of it was so if it worked I would know what helped me and he got disgusted with me, or that was the impression I got. I took the prescription to the pharmacist and I asked him what it was and he said go ask the doctor, just like that. So I asked the doctor again and he said 'I know you Mr. Wright,' so I went to the sociologist's office to try to explain to him so he could give me advice how to get satisfaction from the doctor because I'm having a lot of trouble.

"This treatment thing is a two-timed thing. A patient has a right to tell the doctor if a certain medicine that's been prescribed has been tried before and doesn't work."

He goes on almost endlessly repeating himself, more interested in posing his complaints than seeking advice.

• • •

We retain the same impression as given in the Special Progress Reports of 21 December and 13 October, 1972.

• • •

The District Court found liability on the part of defendants Twomey, Venckus, Trapp, Sharp and Simpson and entered a joint and several judgment against them for $500. The U.S. Court of Appeals affirmed the judgment on November 19, 1974 by Memorandum Order which discussed none of the issues raised (see Appendix A).

REASONS FOR GRANTING THE PETITION

I.

TEMPORARY DISCOMFORT EXPERIENCED BY A PRISONER DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In his findings of fact and conclusions of law, the District Court judge stated:

> "I find liability on the theory that the deprivation of proper medication and diet while the prisoner was incarcerated deprived him of Eighth Amendment rights."

Further, in discussing damages, the court said:

> "Now turning to the matter of damages, there is very little for the Court to go on. *I am satisfied—I say I am satisfied—there is no evidence from which I could find that the plaintiff suffered any physical permanent impairment so what we are talking about is a period of discomfiture, and I suppose it would be proper to characterize it as illness for a period of ten days more or less. At the latter part of the ten days the situation got better.*" (emphasis added).

Defendants urge that the conditions found to exist by the court below, are not sufficient to constitute cruel and unusual punishment.

Punishments which amount to violations of an individual's Eighth Amendment rights have been defined in the past as those which can be characterized as "barbarous," *In re Kemmeler*, 136 U.S. 436, 447 (1890), "shocking to the conscience", *Church* v. *Hegstrom*, 416 F. 2d 449, 451

(2nd Cir. 1969). The general test would thus appear to be whether under all the circumstances cognizable to the court, the type of punishment shocks the general conscience or is barbarous when judged in the light of concepts of elemental decency. *Weems* v. *U.S.*, 217 U.S. 349 (1910); *Robinson* v. *California*, 370 U.S. 660 (1962). The conditions in this record do not meet those tests.

In this case plaintiff made no complaint and offered no proof concerning the actual physical conditions under which he was confined for the ten day period. His only assertion was that the lack of food and medication during the period amounted to a Constitutional deprivation. The result of that lack of food and medication was characterized by the trial judge as "a period of "discomfiture" and we strongly urge that this does not constitute cruel and unusual punishment, especially in view of the surrounding circumstances.

In a Second Circuit case, that Court recently rejected a claim precisely like the one at bar. In *Starz* v. *Cullen*, 468 F. 2d 560 (1972), plaintiff alleged that he suffered from a coronary insufficiency with arteriosclerotic heart disease and a number of other ailments. As a result the doctors had prescribed a strict fat-free diet and prison officials had failed to give him the proper foods. Defendants filed an affidavit showing a good faith attempt at compliance, and plaintiff responded with an affidavit stating authorities had made no attempt to supply a fat-free diet. The District Court dismissed the complaint and the decision was affirmed. The Court said:

> If decision turned on the precise diet afforded Startz since his return from St. Francis Hospital, as might be the case on an application by Startz to a Connecticut court having general jurisdiction over

> prisoner complaints, it might be that a hearing would have been required. However, the scope of the authority of a federal court is much narrower; it is confined to determining whether the medical treatment of the prisoner is so shocking as to constitute a denial of due process prohibited by the Fourteenth Amendment or a cruel and unusual punishment forbidden by the Eighth Amendment, selectively incorporated into the Fourteenth. Church v. Hegstrom, 416 F. 2d 449 (2 Cir. 1969); United States ex rel. Hyde v. McGinnis, 429 F. 2d 864 (2 Cir. 1970); Martinez v. Mancusi, 443 F. 2d 921 (2 Cir. 1970), cert. denied, 401 U.S. 983, 91 S. Ct. 1202, 28 L. Ed. 2d 335 (1971). 468 F. 2d at 561.

See also *Snow* v. *Gladden*, 338 F. 2d 999 (9th Cir. 1964) (where plaintiff alleged improper diet aggravated an ulcer condition causing great physical pain).

We think it clear that plaintiff in this case did not allege, nor did he prove at trial, a deprivation sufficiently serious to constitute cruel and unusual punishment. In light of the record, read as a whole, plaintiff suffered at most a temporary discomfort which was aggravated by his own mental state.

II.

ABSENT A SHOWING OF SHOCKING CIRCUMSTANCES THIS COURT SHOULD NOT PERMIT EXTENSION OF THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT TO EMBRACE PRISONER GRIEVANCES SIMILAR TO THE INSTANT COMPLAINT, PARTICULARLY IN LIGHT OF NEW, HIGHLY RESPONSIVE GRIEVANCE MACHINERY ESTABLISHED IN THE SEVERAL STATES TO REVIEW PRISONER COMPLAINTS.

In recent years the federal courts have faced a burgeoning number of civil rights suits, pursuant to 42 U.S.C. § 1983. The cause at bar is such a suit, and the decisions below stand for the proposition that the unintentional failure of prison officials to provide the prescribed diet to an inmate resulting in temporary discomfiture constitutes cruel and unusual punishment. Petitioners acknowledge the often less than ideal conditions which exist in state prisons yet they urge that the instant claim falls far short of the right designed to be protected under the Eighth Amendment.

The grievance mechanism established in the State of Illinois and many other states is ably equipped to fairly resolve prisoner complaints of discomfort like the present one. More than 50% of prisoner complaints filed in Illinois, through the established grievance procedures, result in some relief being granted. See Appendix C.

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1. Ill. Rev. St at. 1973, Ch. 38, § 1003-8-8.
(a) The Director shall establish procedures to review the grievances of committed persons. The Di-

The case at bar, as representative of hundreds of similar complaints, while fully amenable to local grievance proceedings, should have been dismissed in the District Court for failure to state a claim of a constitutional dimension or for failure to exhaust effective State administrative remedies. See *Morales* v. *Schmidt*, 494 F. 2d 85 (concurring Op. of Chief Judge Swygert) (7th Cir. 1974); *McCray* v. *Burrell*, 367 F. Supp. 1191 (D. Md. 1973) (appeal pending). Lately, the Eighth Amendment has emerged

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rector may establish one or more administrative review boards within the Department to review grievances. A committed person's right to file grievances shall not be restricted. Such procedure shall provide for the review of grievances by a person or persons other than the person or persons directly responsible for the conditions or actions against which the grievance is made.

(b) Such procedures shall provide that a record of such grievance and any decision made with respect to it shall be preserved for a period of one year.

(c) Such procedures shall allow committed persons to communicate grievances directly to the Director or some person designated by the Director outside of the institution or facility where the person is confined.

(d) All committed persons shall be informed of the grievance procedures established by the Department and they shall be available to all committed persons.

(e) Discipline shall not be imposed because of use of the grievance procedure.

See also: General Statutes of North Carolina, Ch. 148-101 and following, Code of Maryland, Art. 41, § 204(f).

as a catchall for many prisoner grievances. The Eighth Amendment was not designed with that end in mind. Justice Douglas points out in *Robinson, Supra*, that the command of the Eighth Amendment stems from the Bill of Rights of 1688, which addressed itself to punishments that were indeed cruel and unusual including burning at the stake, crucifixion, breaking on the wheel, or quartering. He goes on to say that the Eighth Amendment expresses revulsion of civilized man against barbarous acts: The "Cry of Horror" against man's inhumanity to his fellow man.

To extend the prohibition of the Eighth Amendment to the cause at bar constitutes unreasonable and unnecessary federal intervention into matters that could be satisfactorily resolved through state grievance and judicial proceedings.

This Court has spoken at length about the concept of cruel and unusual punishment but it has done so with a view towards the nature of the sentence, never with regard to the internal and administrative affairs of prisons. We submit that a pronouncement by this Court would go far in helping to eliminate specious complaints and lend considerable stability to grievance proceedings within the several states. We call upon this Court to delimit the application of the Eighth Amendment prohibition with regard to internal prison affairs.

Certiorari should be granted and the holding of the Court of Appeals reversed.

CONCLUSION

For the aforementioned reasons, the petitioner respectfully requests this Court to grant the instant Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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